

**Before the
Federal Communications Commission
Washington, D.C. 20554**

DA 05-1613

In the Matter of)	
)	
Improving Public Safety Communications in)	WT Docket 02-55
the 800 MHz Band)	
)	
Consolidating the 800 and 900 MHz)	
Industrial/Land Transportation and Business)	
Pool Channels)	
)	
Amendment of Part 2 of the Commission's)	ET Docket No. 00-258
Rules to Allocate Spectrum Below 3 GHz for)	
Mobile and Fixed Services to Support the)	
Introduction of New Advanced Wireless)	
Services, including Third Generation Wireless)	
Systems)	
)	RM-9498
Petition for Rule Making of the Wireless)	
Information Networks Forum Concerning the)	
Unlicensed Personal Communications Service)	
)	RM-10024
Petition for Rule Making of UT Starcom, Inc.,)	
Concerning the Unlicensed Personal)	
Communications Service)	
)	ET Docket No. 95-18
Amendment of Section 2.106 of the)	
Commission's Rules to Allocate Spectrum at)	
2 GHz for use by the Mobile Satellite Service)	

MEMORANDUM OPINION AND ORDER

Adopted: June 2, 2005

Released: June 7, 2005

By the Acting General Counsel:

1. By this memorandum opinion and order, we deny a Petition for Reconsideration, filed January 24, 2005, by the City and County of Denver, Colorado and Aeronautical Radio, Inc. (Petitioners).¹ Petitioners seek reconsideration of a public

¹ Also before us is an opposition, filed February 3, 2005, by the 800 MHz Transition Administrator.

notice that made presentations by the 800 MHz Transition Administrator (TA) to the Commission exempt under the Commission's ex parte rules.² Public Notice, DA 04-4026 (GC Dec. 22, 2004) (Public Notice).

I. BACKGROUND

2. On August 6, 2004, the Commission released a report and order that addressed problems of public safety interference in the 800 MHz band. Improving Public Safety Communications in the 800 MHz Band, 19 FCC Rcd 14969 (2004), modified, FCC 04-294 (Dec. 22, 2004). The order reconfigures the 800 MHz band to separate out generally incompatible technologies and provides that the reconfiguration will be overseen by an independent Transition Administrator to be selected by a search committee representative of 800 MHz licensees. The search committee selected a three-organization team to serve as the TA, consisting of BearingPoint, Squire-Sanders-Dempsey LLP, and Baseline Telecom, Inc. The Commission's Wireless Telecommunications Bureau concurred in the selection. Public Notice, DA-04-3492 (Oct. 29, 2004).

3. The TA subsequently requested the Commission to exempt it from the Commission's ex parte requirements with respect to presentations to the Commission regarding the 800 MHz reconfiguration. Acting under delegated authority, pursuant to section 1.1200(a) of the rules, the General Counsel released the Public Notice, which granted the exemption. The General Counsel noted that the Commission has exempted other private administrators in the past, that the TA is an independent party with no financial interests in any 800 MHz licensee, and that the exemption would facilitate open communications between the TA and the Commission and would potentially expedite the reconfiguration process.

II. PETITION FOR RECONSIDERATION

4. Petitioners assert that granting the exemption does not serve the public interest and will prejudice their rights in the reconfiguration process. They note that the 800 MHz rebanding proceeding has been treated as permit-but-disclose for purposes of the ex parte rules.³ Petitioners believe that permit-but-disclose treatment appropriately fosters free discussion of the issues while giving interested parties the notice they need to provide valuable input. According to Petitioners, the TA's communications with the FCC should be subject to permit-but-disclose treatment, because they may affect the same parties as do other presentations regarding 800 MHz rebanding issues. Petitioners contend that the TA's broad discretion should not be exercised without being scrutinized, especially where those actions may result in general policies applicable to the reconfiguration process and that may be memorialized in Commission orders.

² 47 C.F.R. §§ 1.1200-16.

³ This means that presentations (communications on the merits) to the Commission may be made without serving or giving notice to all of the parties to the proceeding, but copies of written presentations and summaries of oral presentations must be put on the record. 47 C.F.R. § 1.1206.

5. Petitioners observe that the TA does not fall within any existing exemption to the ex parte rules and maintain that the TA is unlike other entities that have been granted exemptions such as frequency coordinators. Petitioners argue that the TA does not represent 800 MHz licensees and may not have the knowledge to exercise its responsibilities without input from affected parties.⁴ Although Petitioners acknowledge that they could seek reconsideration of any TA decisions that they disagree with, they contend that would be a wasteful process and would be inconsistent with the spirit of cooperation needed to promote the public safety objectives of this proceeding.

6. Petitioners cite specific examples of ways in which they assertedly might be prejudiced by the nondisclosure of presentations made by the TA to the Commission. For example, in Petitioner's view there could be situations where the TA conveyed inaccurate nonpublic information to the Commission that resulted in an order to show cause being issued against a licensee without the licensee having had an opportunity to correct the erroneous information. Petitioners further note that the TA has the responsibility to transmit to the Commission the records related to 800 MHz licensee disputes for de novo review. Petitioners fear that in so doing, the TA might taint the Commission's consideration of the record by imparting to the Commission undisclosed opinions about the record. Petitioners observe that ex parte presentations in hearing proceedings are prohibited by the Administrative Procedure Act.

7. Finally, Petitioners contend that in this context undisclosed ex parte presentations violate the fundamental principles of fairness and transparency that the Commission expects in its proceedings. In Petitioners' opinion, this is especially true because the TA is not subject to any disclosure, open meeting, or public record requirements. Petitioners urge that the TA should not be allowed to create a "shadow record."⁵

III. DISCUSSION

8. The Petition for Reconsideration is untimely. Under 47 C.F.R. § 1.106(f), petitions for reconsideration must be filed within 30 days from the date public notice of the action is given. Here, Petitioners seek reconsideration of a public notice released December 22, 2004. The deadline for seeking reconsideration was therefore January 21, 2005, whereas the petition was actually filed three days later, on January 24.

9. We will nevertheless address the merits of the petition because it raises questions going to the fundamental fairness and integrity of the 800 MHz proceeding. We continue to believe that exempting presentations by the TA will serve the public interest and will not prejudice interested parties. Petitioners' arguments misconceive the role that the TA will play during the current phase of the 800 MHz proceeding. Implementing the reconfiguration of the 800 MHz band will require a high degree of

⁴ Petitioners stress, however, that they are not questioning the competence of the particular entities comprising the TA. Petition for Reconsideration at 7 n.23.

⁵ Because, as explained below, we agree in substance with the views expressed in the TA's opposition, we will not separately summarize them.

administrative coordination and organization by the TA in order to achieve the Commission's goals in an efficient and expeditious manner.⁶ In this respect, the implementation phase of the proceeding is not simply an extension of the rulemaking phase, in which parties' substantive communications primarily addressed whether the Commission should adopt particular rules to address the 800 MHz public safety interference problem. The TA's primary responsibility in the implementation phase of the proceeding is to oversee and administer the complex process of relocating incumbent licensees pursuant to the rules adopted by the Commission. In order to accomplish this task effectively, it is important for the TA to be able to communicate freely and frequently with the Commission about the performance of its administrative functions. It would be burdensome for the TA to place every implementation-related communication with the Commission in the public record. Moreover, each of these filings could generate additional filings or petitions by other parties. This would impose an unacceptable burden on the TA and the Commission, and would thwart the Commission's goal of having band reconfiguration accomplished expeditiously. In this regard, granting the instant exemption for the TA is entirely consistent with the instances in which the Commission has utilized private administrators in the past and granted the relevant administrator an exemption.⁷

10. While we are exempting the TA from ex parte requirements, we agree with petitioners that it is important to have alternative safeguards to ensure transparency in the band reconfiguration process and to protect interested parties, such as Petitioners, from prejudice. We conclude that the alternative safeguards that have been put in place in this proceeding adequately address such concerns. The TA reports that it is adopting an Independent Management Plan that includes a Code of Conduct to ensure that it executes its functions in a fair and equitable manner. Moreover, as the TA notes, it is engaging in significant outreach efforts to communicate with 800 MHz licensees, including distributing materials and conducting meetings and conferences. Finally, the TA will make quarterly and annual reports to the Commission on the details of the reconfiguration, which will be made part of the record in this proceeding.

11. We find no merit to Petitioners' examples of specific ways that they allegedly might be prejudiced. The TA indicates that it is adopting safeguards to prevent the dissemination of erroneous information concerning the 800 MHz rebanding. Moreover, the Commission has no intention of taking any formal actions in this proceeding, such as

⁶ The TA's responsibilities include the following. The TA will ensure that the band reconfiguration proceeds on schedule. It will obtain estimates from licensees regarding the costs of reconfiguring their systems and ensuring that estimates contain a firm work schedule. Once the reconfiguration starts in a given region, the TA will monitor the retuning schedule and resolve any schedule delays and coordinate with adjoining regions to ensure that interference is not being caused. In addition, the TA will facilitate, by proposed decision, mediation, or other means, the resolution of disputes over such matters as the accuracy of cost estimates for reconfiguring systems. See 19 FCC Rcd at 15070-73 ¶¶ 190-96.

⁷ See 47 C.F.R. § 1.1204(a)(12) (granting exemptions to the administrator of the interstate telecommunications relay services fund, the North American Numbering Plan Administrator, the Universal Service Administrative Company, and the Number Portability Administrator). Additionally, presentations by advisory coordinating committee members with respect to the coordination of frequency assignments are exempt. See 47 C.F.R. § 1.1204(a)(7).

ordering an 800 MHz licensee to show cause, based on “unverified” data supplied by the TA. The Commission will not take such action without making inquiry of the licensee, and the licensee ultimately has the right to de novo review by the Commission of any action taken by the TA. It is appropriate for the TA to comment on matters that may later be subject to the Commission’s de novo review, and this does not compromise the fairness and openness of the de novo review process itself. We clarify that once a matter comes before the Commission for de novo review, any subsequent presentations by the TA with respect to that matter will no longer be exempt.

12. In sum, we find that granting an exemption to the TA will serve the public interest by expediting implementation of the reconfiguration of the 800 MHz band; that the exemption is consistent with long-standing precedent; and that it will not prejudice interested parties, such as Petitioners.

IV. ORDERING CLAUSE

13. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority delegated under 47 C.F.R. § 0.251, the Petition for Reconsideration, filed January 24, 2005, by the City and County of Denver, Colorado, and Aeronautical Radio, Inc., IS DENIED.

Austin C. Schlick
Acting General Counsel